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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 132.

THEODORE P. BUCHER, PLAINTIFF IN ERROR,

vs.

THE CHESHIRE RAILROAD COMPANY AND THE FITCHBURG RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 18, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 2, 1887.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Theodore P. Bucher, of Philadelphia, in the State of Pennsylvania, plaintiff, and The Cheshire Railroad Company, a corporation duly established by the laws of the State of Massachusetts, and The Fitchburg Railroad Company, a corporation duly established by the laws of the State of Massachusetts, defendants, in an action of tort, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twentieth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
Circuit Judge.

2 DISTRICT OF MASSACHUSETTS, *ss:*

Circuit Court of the United States.

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this first day of October, A. D. 1884.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-four, before the Honorable Horace Gray, associate justice, and the Honorable Thomas L. Nelson, district judge.

THEODORE P. BUCHER, of Philadelphia, in State of Pennsylvania, he being a Citizen of said State of Pennsylvania, Plaintiff,

4 *v.*

THE CHESHIRE RAILROAD COMPANY, a Corporation duly established by the laws of the State of Massachusetts, and The Fitchburg Railroad Company, a Corporation duly established by the laws of the State of Massachusetts, both said Corporations being Citizens of the State of Massachusetts and having each an usual place of business in Boston, in the District of Massachusetts, Defendants.

In an action of tort.

The plaintiff says the defendants are each corporations duly established by law and common carriers of goods and passengers for hire, the said Fitchburg Railroad Company owning and operating a railway between Boston and Fitchburg, both in said district, and leasing and operating under a lease from the Ver-

5 mont and Massachusetts Railroad Company, the railway known as the Vermont and Massachusetts railway, and the said Cheshire Railroad Company leasing and operating under a lease from the Vermont and Massachusetts Railroad Company the portion of the railway known as the Vermont and Massachusetts Railway, lying between and extending from said Fitchburg to South Ashburnham, in said district; that plaintiff was a passenger on board a train of cars run by said Fitchburg Railroad Company bound for said Boston; that defendant, said Fitchburg Railroad Company, undertook to and were bound in consideration of a rate of fare paid or to be paid to safely carry him as a passenger to said Boston; that said plaintiff was riding upon said train between said South Ashburnham and Fitchburg, on the line of railway operated as

6 aforesaid by said defendants, and that he was in the exercise of due care; that through the fault and negligence of the said defendants, their servants and agents, a collision became imminent and actually occurred between the train on which plaintiff was being carried as aforesaid and another train of cars of the said Cheshire Railroad Company, or by them operated, or other obstruction negligently placed or suffered to remain by said Cheshire Railroad Company, its servants and agents, upon the same railroad track; that said Fitchburg Railroad Company were bound to manage and conduct their train in a skilful and proper manner so as not to put plaintiff in jeopardy or danger, and that both said defendants were bound to have said railway clear of obstructions so

that said train might pass in safety, and to guard against
7 danger and accidents, but they failed to do this; that through the carelessness and negligence of defendants, their agents and servants, the said collision became imminent and actually occurred with great violence; that plaintiff was by reason thereof put in great peril of his life; that, finding or being informed that said collision was imminent and apprehending that his life was in peril if he remained in the car where he was riding, he, in the exercise of a reasonable discretion and due care, concluded to, and did, leap from said train to the ground in order to save his life or escape from what he believed to be and which actually was a greater peril; that in so doing he was seriously hurt in his person and otherwise and permanently injured in body and mind and suffered
8 great pain and was subjected to great expense and loss of time and money, to the damage of the said Bucher, as he says, the sum of ten thousand dollars.

The writ in this cause is dated the thirtieth day of April, A. D. 1881, and was duly entered at the May term of this court, A. D. 1881, when and where the parties appeared by their respective attorneys.

This cause was thence continued to the October term, A. D. 1881, when, on the seventeenth day of October, A. D. 1881, the following answer was filed:

Answer.

The defendants admit that they are corporations duly established by the laws of the Commonwealth of Massachusetts, and that the said Fitchburg Railroad Company owned and operated a railway between Boston and Fitchburg, and they allege that the
9 Fitchburg railroad operated under a lease a portion of a railway called the Vermont and Massachusetts railroad, and admit that the Cheshire Railroad Company owned and operated, under another lease from said Vermont and Massachusetts Railroad Company, a portion of said last-mentioned railroad lying between Fitchburg and South Ashburnham. They deny that the plaintiff was a passenger on board a train of cars run by the Fitchburg Railroad Company, and that said last-named company undertook and was bound to carry him safely as a passenger to said Boston or that said plaintiff, if rightfully in said cars of said Fitchburg Railroad Company, was in the exercise of due care, and that through the fault and negligence of said defendants or either of them or the servants or agents of either, a collision occurred as stated in said declara-
10 tion, or that either of said railroad companies failed to perform its duty in any respect or was guilty of carelessness, and that plaintiff was injured and suffered thereby, and the defendants allege that if the plaintiff was travelling, as alleged by him, and while travelling was injured, he was travelling on a Sunday or Lord's Day, and not from necessity or charity and in violation of the laws of said Commonwealth of Massachusetts, and that if he suffered any injury it arose from and happened in consequence of his violation of said law.

This cause was thence continued from term to term to the October term of this court, when, issue having been joined, the cause after a full hearing, is committed to a jury sworn according to law to try the issue, the Honorable Le Baron B. Colt, district
11 judge of the United States for the district of Rhode Island, duly assigned by the Honorable John Lowell, circuit judge, to hold said circuit court, sitting and holding the court, and the said jury, after hearing all matters and things concerning the same, return their verdict and upon oath say:

The jury find for the defendants.

This cause was thence continued to this present term; and now, to wit, September 20th, A. D. 1884, it is considered by the court, the Honorable Le Baron B. Colt, circuit judge, sitting and holding the court, that the said Theodore Bucher, plaintiff, take nothing by his said writ, and that the said Cheshire Railroad Company and the said Fitchburg Railroad Company, defendants, recover of the said plaintiff their costs of suit, taxed at — dollars and — cents.

12 Upon the trial of said cause the following exceptions were presented and allowed:

Be it remembered that at the October term of said court, begun and holden at Boston, in said district, on the fifteenth day of October, 1883, the said cause came on to be heard and tried before the court and jury; that during said trial certain rulings and instructions in matters of law were made and given by the court and to which exceptions were taken and allowed in behalf of the plaintiff; that said exceptions were reduced to writing and presented to the court and allowed before the jury retired; that the bill of exceptions, with the statements therein, was duly presented and filed in conformity to the rules of the court and the law, and the same being found in accordance with the fact and correct was
13 allowed by the court, and the same, as it appears below, was and is ordered to be entered as a part of the records of said cause, viz:

Bill of Exceptions.

This was an action of tort for damages alleged by plaintiff to have been sustained by him through the negligence of the defendants while he was a passenger in the cars of said Fitchburg Railroad Company. The writ, declaration, and all pleadings on file are referred to as a part of this bill of exceptions.

Defendants are both common carriers of freight and passengers, the Fitchburg Railroad Co. running trains from North Adams, Mass., to Boston, and the Cheshire Railroad Co. from Fitchburg, Mass., to Keene, New Hampshire, and thence to Bellows Falls, Vermont, both companies running on the same track from
14 Fitchburg to Ashburnham, Mass. At the trial before the jury the plaintiff, a resident and citizen of Philadelphia, Pennsylvania, testified that at the time of the accident he was the managing agent of a fire insurance company, attending to their business in New England; that on Saturday, August 5, 1876, being in Rutland, Vt., he took passage and started on the early morning

railroad train of the Bennington & Rutland railroad in course and en route for Boston, said train connecting with said Fitchburg railroad train at North Adams; that the train was due and he expected and intended to reach Boston at 10.30 that evening; that this train reached North Bennington, Vt., a half hour too late to make connections for Boston with the Troy & Boston railroad train which connected with the State railroad run by the Fitchburg railroad at North
15 Adams; that he then enquired of the ticket agent at that station what chance he had to get to Boston that night; that the ticket agent glanced along the time-table on the wall and said: "You can get to Boston at 7.22 in the morning by taking the express freight at North Adams," and advised him to drive right over to Hoosac, a distance of about eight miles; that plaintiff took a carriage and did so, and there took a mixed train, which carried him to North Adams, where he arrived about eleven o'clock that evening, and was there told by the conductor that the express freight started in about twenty minutes, but he found that this train also was delayed; he waited around the station until the express freight backed up and then got aboard, going into the caboose car with the consent of the conductor, starting from North Adams at about one or two
16 o'clock Sunday morning; that there were other passengers in the car; that he had a ticket, which he had bought the previous week, entitling him to be carried over the Fitchburg Railroad Co.'s line from Miller's Falls to Boston, and expected and was ready to pay his fare from North Adams to that place, the office at North Adams being closed so that he could not buy a ticket; that the train reached Ashburnham at about eight o'clock in the morning, and about a half hour afterward, whilst rounding a sharp curve about six miles from Fitchburg, collided with a train operated by the said Cheshire Railroad Co. which was standing still upon the said track used in common by both defendants from Ashburnham to Fitchburg; that the car in which plaintiff was riding was telescoped, and he was seriously injured in his side and about his
17 head, having his arm and the bones of his neck fractured, occasioning a permanent disability, for which he claimed damages to the amount of ten thousand (10,000) dollars.

The plaintiff also testified, in answer to questions put to him by counsel on direct and cross-examination, as follows, viz:

(By Mr. CLARK, pl'ff's counsel:)

Q. When you came down to Bennington and missed the Boston train why did you not stay over there?

A. I wanted to reach Boston for a special reason.

Q. What was that?

A. I had heard from my sister, who was in Minnesota, stopping with an uncle, where I sent her for her health a year previous to that. I had a letter from her that she was very ill, and expressed in her letter that she preferred to be brought home to die.
18 She had been feeble for a number of years.

Q. Were you supporting her at this time?

A. I was; yes.

Q. Had you made any reply to the letter she sent you?

A. I wrote her back that if she could prevail on my cousin to bring her as far as Chicago I would meet her there and bring her the rest of the way; or if he preferred to go clear through to Philadelphia I would be very glad, because my business was such that it was disadvantageous to leave my field any longer than it was necessary.

Q. Had you informed your sister where she could reach you by mail?

A. I had, and when.

Q. Where was it?

A. That I would be in Boston on the first Saturday of August, and whatever was her wish I would carry out—either go to
19 Chicago or through to St. Paul if it were necessary.

Q. That is, would you go through to St. Paul after leaving Rutland in the morning? Do you mean you would have gone there if this letter had not stopped you in Boston?

A. It is equivalent to that, yes.

Q. What time did you expect this letter from your sister to reach Boston—to reach you in Boston?

A. I expected it to be there on the Saturday I was going.

Q. Then, as I understand, if this man could not accompany her East you were going on after her and bring her yourself?

A. I would have gone on Saturday night.

Q. Was that letter brought to you at any time?

A. It came to me whilst I lay at the Roolstone House, Fitchburg, on the Tuesday after the accident.

Q. Brought up by any person?

20 A. By Mr. Merrifield, the general agent of my company residing in Boston.

(By Mr. SOHIER, defendants' counsel:)

Q. You say you expected a letter from her in Boston?

A. Yes, sir.

Q. What is the date of the letter you wrote her?

A. It may have been about the 15th of the month or it may have been later than that date. I am rather inclined to the opinion that it was the 20th of the month.

Q. The month of July?

A. The 20th of July.

Q. You say you wrote your sister. You have been examined before in this case in the Massachusetts supreme court?

A. Yes, sir.

Q. Did not you say before the letter was received about the 15th of July?

21 A. Yes, sir, and I say so now; about the 15th of July, but I think the probabilities are that it was the 20th or 21st, the reasonable probabilities.

Q. When did you receive the letter from her?

A. About that time.

Q. A short time before you answered it?

A. Yes, sir.

Q. You answered it the 15th?

A. 15th to the 20th.

Q. Have you had any occasion or reason why you should change any part of your previous testimony?

A. No, sir; I don't, except to make the correction in that one important particular.

Q. What is that?

A. That I expected that letter that Saturday in Boston, at the office of the general agent. I as fully expected it as yesterday I expected to be on the witness stand to-day.

Q. You expected to find a letter from your sister, then?

22 What made you expect to find it then more than any other Saturday?

A. Because I had notified her where to address me, and the time.

Q. When did you give her that notice?

A. I gave her that notice perhaps as late as July 22d.

Q. Is the letter you now allude to the same letter which you say was about the 15th?

A. It is the same letter, for I think it was likely the 20th or 22nd.

Q. Where were you when you wrote that letter?

A. I think that letter was written from Concord, to the best of my recollection—Concord, N. H. To the best of my recollection, I was at Concord the 21st, 22nd, 23d, and 24th of July.

Q. Are you testifying from memoranda you made?

A. No; except in trying to rehearse my field of operations

23 to see where I was and ascertain as nearly as I can where I received the letter from my sister.

(By Mr. CLARK:)

Q. Something has been said about your testifying, at the last trial of the case before the Massachusetts supreme court, that you wrote the letter to your sister about the 15th of July. When was the time of writing that letter first called to your attention?

A. When I was asked the question on the witness stand before said court.

Q. When you testified at the last trial before said court?

A. Yes, sir.

Q. Was that the first time you had ever had your attention called to it?

A. That was the first time.

Q. You then stated about the 15th of July?

A. Yes, sir.

Q. How long after the accident was it when you testified—how many years?

A. Nearly three years.

24 Q. Had your attention ever been called in any way to the date of that letter until you were testifying?

A. No; it had not.

Q. Well, since then have you refreshed your recollection in any way as to the time when you wrote it?

A. The best I could within the past few days.
Q. How?
A. By thinking over my routes of operations when out in the field of labor taking care of the interests of my company, where I was likely to have been on such a week and at such a week, and when I was likely to have received this letter and when I was likely to have answered it.
Q. On what day did you expect this letter to arrive in Boston?
A. Which letter do you now refer to?
Q. The answer which was to come back from your sister.
25 Did you expect that the answer from your sister would arrive before the 5th day of August, upon Saturday?
A. I directed her to write me at Boston by Saturday, the first Saturday of August, that I would be in Boston at that time, and would complete arrangements for bringing her home or sending for her.
Q. Now if you will answer the question, whether you expected the letter to arrive earlier than Saturday?
A. Not earlier than Saturday.

(By Mr. SOHIER:)

Q. Your sister was in Minnesota. Where was she—in St. Paul?
A. In St. Paul.
Q. Where she could be telegraphed to?
A. Yes, sir.
Q. Where she could telegraph you if she knew where you were?
A. Yes, sir.

26 The conductor of defendant's, Fitchburg Railroad Co.'s, train, called by plaintiff, testified that his train was some two hours late in leaving North Adams; that he was accustomed and allowed by the Fitchburg Railroad Co. to carry passengers on that train, and he took fares, which he turned over to the company; that he had not asked plaintiff for his fare or ticket, as he had been asleep; that the collision occurred between stations, and the trainmen in charge of the train of the Cheshire Railroad Co., defendant, with which his train collided, neglected when they brought their train to a standstill to send back or set any or proper danger signals to warn him of their so being on the track ahead. No fault was ascribed to plaintiff except that he was travelling on Sunday.

27 Plaintiff contended and introduced evidence tending to show that said collision occurred through the joint negligence of defendants and that the nature and extent of the injuries received by him and caused by same were of a serious and permanent character, occasioning damages amounting to a sum exceeding $5,000, which he claimed a right to recover upon the evidence.

At the conclusion of the testimony offered by plaintiff defendants' counsel, not offering any evidence, cited and read to the court the case of this plaintiff against defendant The Fitchburg Railroad Co. alone, reported in Massachusetts Reports, vol. 131, page 156 (which it was admitted was brought to recover damages for the accident

now made the subject of this suit and in which the plaintiff became nonsuit voluntarily after a new trial was granted), and contended that under the law of Massachusetts relied on in its answer
28 the plaintiff could not recover; that there was no evidence which would justify the jury in finding that he was travelling from necessity or charity, and that he could not maintain the action.

Plaintiff's counsel contended and claimed and asked the court to rule that the mere fact that he was travelling on the Sabbath or Lord's Day was not of itself alone a defence to the action or such as to prevent a recovery independently of the question whether he was travelling from necessity or charity or not; that the statutes of the State of Massachusetts on that subject did not apply and constituted no defence under the law and the decisions of the Federal courts.

His honor the presiding judge ruled as follows, viz:

In respect to the motion for a nonsuit the defendant bases his motion upon three grounds:
29 First, that this case has been before the supreme court of Massachusetts, and the supreme court, upon the same state of facts arising upon the construction of a local statute, have decided that the plaintiff cannot recover by reason of a violation of the law with respect to Sunday; secondly, that the United States courts are bound to follow the construction which the supreme court of a State puts upon a local or State statute; and, thirdly, that the case presented by the plaintiff is substantially the same case which was presented before the State court. It seems to me that the law is well settled that the United States courts are bound to follow the decisions of the supreme court of a State upon the construction of a local statute, and that this case comes within that principle or doctrine, and that therefore the only question which arises here is
30 whether the plaintiff does present a different case from that which was decided by the supreme court of the State. Of course this identical case was before the supreme court—the very case which we have here—and the only point is whether the facts which the plaintiff now presents are different from the facts which were before the State court. It does not seem to me that there is any material change in the testimony. I think that the testimony is substantially the same as was presented before the State court; that the changes which the plaintiff makes are immaterial, and do not affect the principles which were laid down by the State court—that is, admitting the testimony to be true as it goes in here, the principles laid down by the State court in construing the Sunday law, so called, would apply to this case.
31 Now the State court decided that this was not an act of charity or necessity on the part of the plaintiff; that he was not engaged in an errand of charity or of necessity. It seems that he was to receive a letter upon his arrival in Boston which was to determine whether he should go to the West for the relief of his sister. He was injured on coming to Boston before his arrival here—that is, in one sense, the act of necessity or charity had not begun. It was not determined whether he should be obliged to go upon this errand

until he received this letter. The letter might be of such purport as not to call for him to go for the relief of his sister, and therefore the supreme court say that the act of ascertaining whether a person shall do a charitable act is not an act of charity, and so far
32 as the necessity of the act is concerned the supreme court say that it must be a necessity which cannot be avoided; it must not be a necessity which arises from convenience. In other words, I cannot perform my secular duties during the week to the neglect of a necessary act, and then wait until Sunday to perform an act and call it a necessary act. I cannot repair a water-wheel upon Sunday, during the time that the mill may have been stopped, although the stoppage of the mill upon a week day might throw a thousand men out of employment and cause me very material damage. So here the plaintiff in this case received a communication from his sister about her illness the second week in July. Now whether he directed her to immediately answer the letter which he sent in reply to that communication, which was the condition of the evidence in the
33 State court, or whether he directed her to answer the letter upon Saturday, August 6th, when he was to arrive here, and not, if you please, to have the letter arrive sooner, cannot make any difference in the principle of the case, because from the second week in July up to the 6th of August he was engaged in his secular avocations, and therefore the act was not such an act of necessity as could not be helped, but he postponed his necessary act in order to engage for some time in his secular avocations. Therefore, it is very clear to my mind that upon the slight change in the testimony which is produced here the plaintiff still comes within the rulings of the supreme court of this State.

Now, I am not here to decide the question whether the court approves of this Sunday law or not. I am not here to decide the
34 question whether, if the case came up in the first place before this court, I should not allow this question, whether it was an act of necessity or charity, to go the jury. In my present position I am debarred from this, and the only question for me to decide is whether the case presented here is substantially the same case as that presented in the supreme court and whether the principles laid down there in this identical case apply to the slightly different state of facts which is presented here. That is the only question. I am of opinion that it is substantially the same case, and therefore that I should abide by the decision of the supreme court of the State. As it is not customary for the United States courts to grant a nonsuit, perhaps the better way would be to direct a verdict for the defendant-.

35 Mr. CLARK: Will your honor pardon me for submitting one more point: Whether or no, as the evidence now stands, we are entitled to go to the jury upon the question whether this letter, in the ordinary course of the mail, would not have arrived upon the day which he says he expected it to come. We base it on this state of the evidence—that the letter was written to his sister about the 22nd of July. The evidence shows that it would take four or five days for the letter to go out there and then four or five days for

a letter to come back, and under the circumstances and as the evidence puts it his sister was to ascertain whether a gentleman would accompany her as far as Chicago or perhaps as far as her home in Philadelphia, or whether, if he found himself unable to come with her, she was in a condition to be moved; and, further, whether
36 this man was to go on for her. Now, it seems to us that there is a question which the jury are entitled to pass upon: Whether the letter, under all the circumstances, would have arrived in Boston earlier than Saturday, the 5th day of August, when he says he expected it to come—that is, that the facts which appear in the record of the lower court are not the same facts that are shown here, and that there is something for the jury to pass upon in that particular, because, as your honor sees, if it took four or five days for the letter to go out there and four or five days for the reply to come back, that would consume ten days, and from the 22nd of July to the 5th of August it would leave only two or three days, and the question is, Whether or no Mr. Bucher was entitled to be-
37 lieve that she might take those two or three days for the purpose of ascertaining whether this gentleman would come with her or if she was in a condition to be moved and to make up her mind whether he should come for her at this time.

COLT, J.: I hardly think that could make any difference. It seems to me that he, having knowledge that his sister was ill the second week in July, ought then immediately, under the decision and ruling of the supreme court of the State, to have communicated with her, and not to have delayed from the second week in July until the 22nd or the 26th—that is, from the time that he received this letter for several weeks he was engaged in his secular business.

Mr. CLARK: I think your honor has misunderstood what
38 I said was the testimony now. The fact of his sister's illness did not come to his knowledge until the 22nd of July. The first knowledge that he had of it, as he says and as the evidence stands, was from the letter that was forwarded to him at Concord, New Hampshire, from the main office. That he fixes as the 22nd of July, so that he did not have knowledge of his sister's illness on the 15th; but as soon as he ascertained, on the 22nd, that his sister was ill he immediately replied to her letter, as the evidence now stands.

Mr. WADLEIGH: Your honor will remember that he fixes the time of his being at Concord from the 20th to the 24th. This letter was forwarded to him at Concord, and he received it there and answered it as soon as he received it.

COLT, J.: I cannot but think that, upon the testimony pre-
39 sented, this case comes within the principles laid down. The motion is granted.

The presiding judge thereupon directed the jury to return a verdict for defendants, and plaintiff then duly excepted to all said rulings and refusals to rule, directions, and doings of the presiding judge, and said exceptions were duly allowed. The jury returned a verdict for defendants, as directed by the presiding judge, as above stated.

The foregoing bill of exceptions is allowed.

LE BARON B. COLT,
U. S. Cir. Judge.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

40 *Assignment of Errors.*

Circuit Court of the United States, District of Massachusetts.

THEODORE P. BUCHER *v.* THE CHESHIRE RAILROAD *et al.*

The plaintiff assigns the following errors, viz:

The presiding judge erred in refusing to rule that the mere fact that plaintiff was travelling on the Sabbath or Lord's Day was not of itself alone a defence to the action, or such as to prevent a recovery independently of the question whether he was travelling from necessity or charity or not, and in refusing to rule that the statutes of the State of Massachusetts on that subject did not apply and constituted no defence under the law and the decisions of the Federal
41 courts, and in ruling that there was no evidence which would justify the jury in finding that plaintiff was travelling from necessity or charity and he could not maintain this action, and in directing the jury to return a verdict for defendants.

RANNEY & CLARK, *Att'ys.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

42 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Theodore P. Bucher *v.* The Cheshire Railroad Company and the Fitchburg Railroad Company in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this first day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

43 *Bond on Writ of Error.*

Know all men by these presents that we, Theodore P. Bucher, of Philadelphia, in the State of Pennsylvania, as principal, and Titus S. Church, of Boston, and John E. Dow, of Cambridge, both in the State of Massachusetts, as sureties, are held and firmly bound unto the Cheshire Railroad Company and the Fitchburg Railroad Company, both corporations duly established by the laws of the State of Massachusetts, in the full and just sum of three hundred dollars,

to be paid to the said Cheshire Railroad Company and said Fitchburg Railroad Company, their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the sixteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said Theodore P. Bucher, plaintiff, and the said Cheshire Railroad Company and the said Fitchburg Railroad Company, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said plaintiff shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THEODORE P. BUCHER. [L. S.]
TITUS S. CHURCH. [L. S.]
JOHN E. DOW. [L. S.]

Signed, sealed, and delivered in presence of—
ALEX. H. TROWBRIDGE.

Approved:
LE BARON B. COLT,
Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Massachusetts C. C. U. S. No. 132. Theodore P. Bucher, plaintiff in error, *vs.* The Cheshire Railroad Company and the Fitchburg Railroad Company. Filed 18th October, 1884.

125-533

Supreme Court of the United States.

No. 132.

THEO. C. BUCHER, Plaintiff in Error,

vs.

FITCHBURG RAILROAD COMPANY et Al.

PLAINTIFF'S BRIEF.

A. A. RANNEY, *for Plaintiff.*

BOSTON:
GEO. H. ELLIS, PRINTER, 141 FRANKLIN ST.
1887.

Supreme Court of the United States.

No. 132.

THEO. C. BUCHER, Plaintiff in Error,

vs.

FITCHBURG RAILROAD COMPANY et Al.

PLAINTIFF'S BRIEF.

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Supreme Court of the United States.

No. 132.

THEO. C. BUCHER, *in Error*,

v.

FITCHBURG RAILROAD COMPANY *et Al.*

PLAINTIFF'S BRIEF.

This case is brought to recover damages for personal injuries inflicted upon the plaintiff by reason of the joint tort of the defendants, while he was travelling in the State of Massachusetts, as a passenger on a train operated by one of them. The case, as proved before the court and jury, had but one element of defence, and that was the fact that the day on which the misfortune occurred was Sunday; and the court, on that ground alone, ordered a verdict for the defendants. Exceptions were taken to this ruling and order, and this furnishes the alleged error assigned then and now.

The facts are that the plaintiff, a resident and citizen of Philadelphia, Pa., was engaged as an agent for an insurance company of that city, operating in their behalf in New England, his duties requiring him to travel about the country, while he had his headquarters and post-office address at the office of the general agent in Boston, Mass. On August 5, 1876 (Saturday), he was in Rutland, Vt., and started on that day for Boston in a regular continuous line of railway, *via* North Bennington, Vt., and North Adams, Mass., and then by the Tunnel route over the Fitchburg railroad, destined and expecting in due course to reach Boston about 10.30 in the evening of the same day. The train was detained, so it missed its connection at Bennington. Finding on inquiry that, if he could get to North Adams, he could there take another train, a freight train with a caboose car attached, in which passengers were taken, and get into Boston at

7.22 on Sunday morning, he got to Hoosac by carriage, and from there by rail to North Adams at about eleven o'clock in the evening. He would have started in about twenty minutes from that time, but the train proved to be about two hours late, and he did not get aboard until about one or two o'clock in the morning. The train reached Ashburnham, Mass., about eight o'clock A.M., and the accident occurred within about six miles of Fitchburg, Mass. He had a special reason for his reaching Boston Saturday night, and, being defeated in that, as soon thereafter as possible. His sister, whose home was in Philadelphia, had been sent by him to Minnesota for her health. He had had a letter from her that she was very ill, and saying that she preferred to be brought home to die. He was supporting her. He had answered her, asking her to get a cousin to bring her to Chicago, Ill., and he would meet her and carry her the rest of the way, unless the cousin would take her through to Philadelphia, he preferring the latter on account of his pressing business. He had informed her that he would be in Boston on the first Saturday of August, and would carry out her wish, whatever it was,— either go to Chicago or St. Paul, if necessary. He was going to St. Paul, unless stopped by the expected letter at Boston. He expected the letter that Saturday night, and was intending to start from there.

The statute of Massachusetts, as it stood then, reads thus: —

"Whoever travels on the Lord's day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars." (Gen. St., ch. 84, § 2.)

The plaintiff first sued in the State court, had a trial, and got a verdict, the case being submitted to the jury, on the evidence as it then appeared, under the exception of the statute. The full court set it aside and granted a new trial, as being against the evidence, or without evidence to warrant a verdict.

Bucher *v.* Fitchburg R. Co., 131 Mass. 156.

The plaintiff thereupon became nonsuit in the State court, and brought this action in the federal court, he being a citizen of another State than the defendants, and desiring to invoke the law of the United States.

After said accident had happened, and before the suit in the State court was brought, the General Court of Massachusetts passed this statute, namely: —

"The provisions of § 2 of ch. 84, Gen. St., prohibiting travelling on the Lord's day, shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling."— Approved May 15, 1877.

This last-named statute was held by the State court not to be retroactive, and not to affect this case.

The court below followed the doctrine of law as held by the Supreme Court of the State of Massachusetts, which this court will find stated in Stanton *v.* Met. R. Co., 14 Allen, 485, thus: "Being engaged in a violation of law, without which he would not have received the injury sued for, the plaintiff cannot obtain redress in a court of justice." He seems, however, to have gone further than this, and treated the ruling of the State court in Bucher *v.* Railroad Co., 131 Mass. 156,—that the evidence reported therein was not sufficient to warrant a verdict for the plaintiff, and that a new trial must be had before a jury, leave for which was granted,—as a conclusive adjudication on the issue of fact presented again to a jury in the Circuit Court, rather than as a legal authority only. The adjudication in the State court was not pleaded in bar, and would not have availed as such, if it had been, as there was only a voluntary nonsuit in the case.

LAW OF MASSACHUSETTS NOT BINDING.

The only effect which can properly be given to the decisions of the State court in this case is as an authority in matter of law, except that possibly the construction put upon the statute of May 15, 1877, as to its not being retroactive, may be binding on this court; and we respectfully submit that the court below erred in this respect. He disregarded a general principle and rule of law, as adjudicated in the federal courts, and by other high authorities in other States, and followed the doctrine as held in the State of Massachusetts, treating the same as binding upon him, although his own opinion might be otherwise.

In case of Sawyer *et al. v.* Oakman *et al.*, 1 Lowell, p. 134 (affirmed by Woodruff, J.), the court held itself bound by the doctrine of this court as against the decisions of the courts of Massachusetts. The court says: "Now, to the extent of holding that work done in contravention of the statute is illegal, it may be that the local law should govern, but the statute itself is silent concerning the legal

consequences of doing such an act, excepting to the extent of the penalty directly imposed. The effect which it may have on the wrong-doer's standing, as regards third persons, is no part of the construction of the statute, but the application of a general principle of law." 7 Blatch. 290

It is also held, in Hough *v.* Railway Co., 100 U. S. 214, that where a case depends upon principles of general law, and not upon statute regulations, this court is not bound by the decisions of the State courts. That was a railroad case of tort. See also —

Myrick *v.* Mich. C. R. Co., 107 U. S. 102.
Railroad Co. *v.* Bk., 102 U. S. 14.
Chicago City *v.* Robbins, 2 Black, 418.
Oates *v.* Bank, 100 U. S. 239.
Branch *v.* M. & B. Railroad Co., 2 Woods, 385.

In Burgess *v.* Seligman, 107 U. S., p. 34, this court says: "The very object of giving to national courts jurisdiction to administer the laws of the State, in controversies between citizens of different States, was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views. It would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudications."

It may be regarded as an established rule in this court that, where private rights are to be determined by the application of common-law rules alone, the federal courts are not bound by the decisions of the State courts.

There is a very good reason why this court should have a doctrine of its own in cases like the one at bar.

Lines of railway are long and continuous, extending through different States, and citizens of different States travel over them. There ought to be a uniform rule of law to be administered in federal courts on such a subject.

THE SOUND RULE OF GENERAL LAW.

If right in this position, we then submit that the doctrine laid down by this court in Railroad Co. *v.* Towboat Co., 23 How. 209, and followed by Lowell, J., in case of Sawyer *et al. v.* Oakman, 1 Lowell, 134 (approved by Woodruff, J.), is the only sensible and sound view to take of the law.

We cite also, in support of this contention, the following cases, namely: —

Sutton *v.* Wauwatosa, 29 Wis. 21.
Schmid *v.* Humphrey, 48 Iowa, 475, 652.
Carroll *v.* Staten Island R. Co., 58 N. Y. 126.
Mohney *v.* Cook, 26 Pa. St. 342.
Merritt *v.* Earle, 29 N. Y. 125.
Johnson *v.* Irasburgh, 47 Vt. 28.
Bigelow on Torts, 309.
Thompson on Neg., vol. 2, 1094.
Strickler *v.* Hough, 1 Pitts. 237.
Moulton *v.* Sanford, 51 Me. 199.
Baker *v.* Portland, 58 Me. 199.
Norris *v.* Litchfield, 35 N. H. 271.
Cory *v.* Bath, *ib.* 530.
Sanders *v.* R. Co., 13 Abb. Pr. (N. S.) 339.
Wharton on Neg., § 321.
Cooley on Torts 156-7

The trouble with the doctrine, as held by the Supreme Court of Massachusetts, is this: It has applied its doctrine to cases of highway and railway accidents alike, disregarding the distinction made by the Supreme Court of Vermont in Johnson *v.* Irasburgh, 47 Vt. 28. It makes that an efficient cause of the injury which is not such. It treats travelling on Sunday as contributing necessarily to the result, when it is not the natural or usual result of travelling on Sunday that damages should follow. It is a species of judicial outlawry; it ignores the analogies of the law and the principles of humanity; it impinges upon a well-settled rule of general law, which the same court has itself recognized and enforced in other cases, to wit: —

Welch *v.* Wesson, 6 Gray, 505.
White *v.* Lang, 128 Mass. 598.
Steele *v.* Burkhardt 104 Ills. 535

The doctrine of the Court of Massachusetts is generally regarded as strained, unwarranted, and unjust (2 Woods, R. L. 1248): —

Wallace *v.* Co., 134 Mass. 95.
Com. *v.* R. Co., 80 Ky. 291.
Platz *v.* Cohoes, 89 N. Y. 219.
Baldwin *v.* Barney, 12 R. I. 392.
Bayley *v.* Mayor, etc., 3 Hill, N. Y. 536.
Kerwhacher *v.* R. Co., 3 Ohio St. 172.
Opsahl *v.* Judd, 30 Minn. 136.
Jacobus *v.* R. Co., 20 *ib.* 130.
Wood *v.* R. Co., 72 N. Y. 196.

The mere fact that the plaintiff on the one hand, or the defendant on the other, was engaged in violating the law in a given particular at the time of the happening of the accident will not bar the right of action of the former, nor make the latter liable to pay damages, unless such violation was an efficient cause of the injury.

We insert copious extracts from the opinions of the court in some of the cases cited, showing that this general rule of tort governs the case at bar.

Mr. Justice Grier, in 23 How., p. 207, says: —

"The law relating to the observance of Sunday defines a duty of a citizen to the State, and to the State only. For a breach of that duty, he is liable to the fine or penalty imposed. Courts of justice have no power to add to this penalty the loss of a ship by the tortious conduct of another, against whom the owner has committed no offence."

The court say, in Carroll *v.* Staten Island R. Co., 58 N. Y. 126: "The defence is purely extraneous. . . . The negligence of defendant was as wrongful on Sunday as any other day, and was as likely to be followed by injurious consequences. *The plaintiff's unlawful act did not contribute to the explosion. To hold the carrier exempt from liability because the plaintiff was violating the Sunday law, would be creating a species of judicial outlawry to shield a wrong doer from a just responsibility for his wrongful act.*"

Dixon, C. J., in 29 Wis. 21, demonstrates that the violation of the law is an independent and disconnected act, and not a concurring or contributing cause within the rule of common law, and concludes: "*Connection, therefore, merely in point of time, and the wrong or omission of defendant, the same being in other respects disconnected and independent acts or events, does not suffice to establish contributory negligence, or to defeat the action on that ground. As observed in Mohney v. Cook, such connection, if looked upon as in any such a cause, whether sacred and mysterious or otherwise, clearly falls under the rule.* Causa proxima non remota spectatur."

In Baker *v.* Portland, 58 Me. 199, the court say: "*The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or*

without giving half of the road, or that he was travelling on runners without bells, in contravention of the statute [see Moulton *v.* Sanford, 51 Me. 134, by Appleton, C. J.], *or that he was smoking a cigar in the street, in violation of municipal ordinance, while it might subject the offender to a penalty, will not excuse the town, etc., if the commission of the offence did not in any degree contribute to produce the injury of which he complains.*"

In Schmid *v.* Humphrey, 48 Iowa, 652, the court say: "*The fact that the plaintiff was at the place at the time he was injured did not directly contribute thereto. As well might it be said, if he had never come to Iowa, or been born, he would not have been injured, and that, therefore, by reason of such facts, he contributed to the injury.*"

In Johnson *v.* Irasburgh, 47 Vt. 28, the court agree with the doctrine of the cases cited above, to the extent that the unlawful act of travelling on Sunday does not prevent a recovery because it was in any sense contributory negligence, or because it was simply an illegal act. They say: "*Whether he is lawfully or unlawfully there, when there, the same causes and forces produce the accident in one case as in the other; and the fact that the injured one is present unlawfully is not a factor which contributes to the happening of the accident.*"

In Strickler *v.* Hough, 1 Pitts. 239, Pa., the court say: "The injury arose from the sole act of the defendant, an obstruction unlawful at all times and seasons, and unmitigated by any fault in the plaintiff uniting in the production of the injury. Not that the plaintiff was without fault in his breach of the Sabbath, but that he was in none which united in the causation of the injury. It is true, if the plaintiff had not navigated the stream, the injury would not have happened; but it happened, not because he navigated on Sunday, but because he navigated at all. No logical consequence follows from the time of navigation to the injury happening. As to the time, the injury is *post hoc, non propter hoc*. . . . Let Sunday navigation be right or wrong, the time is not the cause of the injury; and the plaintiff participates not in the cause, but the wrong is the same, whether it happened on one day or another. This being the position of defendant toward the case, he cannot ask that not only the penalty of a violated statute, but that a forfeiture of a right of action shall be inflicted to give it efficacy. . . . *It is difficult to see*

how a wrong-doer in one thing can protect himself against redress because his injury fell upon one who was a wrong-doer in another," — the case there being analogous to the present one.

If the law forbade smoking or profane swearing on the cars, and a passenger was guilty of this, and while so doing was injured by the independent fault or wrong of the defendant, it might with equal propriety be urged in defence to an action for the tort of the defendant, as is said by Dixon, C. J., in effect, in 23 Wis. 21 : —

"The principle is that the violation of Sunday law does not contribute to the result, since it is not the natural or usual result of travelling on Sunday that damages should follow."

Bigelow on Torts, 309.

"Wrongful acts or omissions cannot be set off against each other so as to make the one an excuse for the other, unless they stand respectively in the situation of true causes to the damage."

Ibid., 309.

It is a misnomer to call the offence against the law contributory negligence, or "a contributory cause," unless the same operated as an efficient cause in the production of the injury. Two passengers, one travelling from necessity or charity, and the other not, sit side by side, and both using the same kind and degree of care: both are injured by defendant's tortious act. How can it be justly said that there is contributory cause, or a want of due care, in one case more than the other?

The rule adopted in the Massachusetts cases, and followed blindly in one or two other of the New England States, closely impinges on the well-settled general rule of law as to the effect of collateral unlawful acts, and is condemned in

2. Thompson on Negligence, 1093-4.

This court condemned the doctrine of two of the leading cases in Massachusetts, such as Bosworth *v.* Swansey, 10 Met. 363; Gregg *v.* Wyman, 4 Cush. 322. The latter case was condemned in Woodman *v.* Hubbard, 25 N. H. 67, and in Morton *v.* Gloster, 46 Me. 420; and, finally, the case was overruled in the same court in Hall *v.* Corcoran, 107 Mass. 251.

The Supreme Court of Connecticut, in Frost *v.* Plumb, 40 Conn. 111, has dealt with the doctrine also, pushing that of the overruling case still further.

The State court has, however, adhered uniformly to the old general doctrine, not heeding the case cited from this court in 23 How. 209.

When the people began to realize the fact, the General Court came to the rescue and overruled the doctrine as held: first, as to torts of common carriers, in the law of 1877 cited; then, generally, as to all parties, in the statute of 1884, ch. 37. It is no longer the law of the State, thanks to the General Court.

Upon principle, it cannot be justly held that the plaintiff's cause of action in the case at bar rests upon any illegal contract. The injury arose from a tort independent of all contract. The contract for passage was made in the State of Vermont on Saturday, and the delay of the trains was caused by an unforeseen accident, which the plaintiff was not bound to anticipate. There was no moral turpitude. "The duty imposed by law upon a carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury against a passenger, an action lies against the carrier, although there be no contract, and the service he is rendering is gratuitous; and, whether the action is brought upon contract or for failure to perform the duty, the liability is the same."

Carroll *v.* Staten Island R. Co., 58 N. Y. 126.
Merritt *v.* Earle, 29 N. Y. 115.

In Bretherton *v.* Wood, 3 Brod. & Bing. 54, Dallas, C. J., says:—

"The action is on the case against a common carrier, upon whom a duty is imposed by law to carry passengers, so that by their negligence or fault an injury happens. A breach of duty is a breach of the law; and for this breach an action lies, founded on the common law."

In Philadelphia, etc., R. Co. *v.* Derby, 14 How. 485, Grier, J., says:—

"This duty does not result alone from consideration paid for service: it is imposed by law."

Tattan *v.* G. W. R. Co., 2 El. & El. 844.
Hutchinson on Torts, § 563, and cases cited therein.

If this court does not adopt the views advanced, then we submit:

AS TO THE EXCEPTION OF THE STATUTE.

The State court, in dealing with the case before them, were determining whether the evidence adduced was sufficient to sustain the verdict which had been rendered. They were dealing with an issue of fact, with reference to the law, and not with a rule of law simply.

What the court say in Smith *v.* Railroad, 120 Mass. 490, is the law of Massachusetts, namely: —

"It is not easy to define, as a matter of law, what state of facts will make travelling an act of necessity or charity within the exception in the Lord's Day Act, or when the plaintiff's own illegal conduct can be said to be a direct, rather than a remote, cause contributing to the injury. The first of these questions is to be determined, to a great extent, by considerations of moral fitness and propriety; the last by the evidence in each case bearing upon the complicated relations of cause and effect. In most cases, both questions should be submitted to the jury, with proper instructions."

So in Feital *v.* R. Co., 109 Mass. 398, the court say: —

"The necessity of travelling, within the exception in the Lord's Day Act, is, to a great extent, determined by its moral fitness and propriety; and it would have been erroneous to have ruled, as matter of law, that travelling for such a purpose was not within the exception."

The court, in construing the statute as matter of law, have defined the words "necessity" or "charity" to comprehend all acts which it is morally "fit and proper should be done on the Sabbath."

"The necessity intended by the statute is not to be limited, on the one hand, to absolute physical necessity, nor, on the other hand, is it to be so enlarged as to include mere business convenience or advantage."

Davis *v.* Somerville, 128 Mass. 597.

The case in the State court, as I remember it, went to the full court on a report, so the court could determine certain exceptions, and whether the jury were justified on the case shown them in render-

ing the verdict. The court only held, in reviewing the facts, that the verdict was against the evidence, or without evidence, under the rules of law laid down.

The court below has held the ruling conclusive in this case, just as though it was *res adjudicata*, when such it was not, not being so pleaded, and there being no final judgment which could properly so operate, if pleaded.

A careful examination of that opinion shows that the court held adversely to the plaintiff, on the ground that he had made the aid to his sister a consideration subordinate to his secular business. I must confess that I fail to appreciate the ground on which that idea is based. He did not arrange his secular business so as to necessitate travelling on Sunday, in Massachusetts, in violation of the statute. He planned so he would arrive in Boston early Saturday evening. He did for his sister all that mercy and charity required, in perfect consistency with an observance of the law. His necessity for travelling on Sunday for the rest of the route arose, not from his plan, but from an unforeseen emergency. The theory of the court would seem to be that he should have dropped all business at once, and gone to his sister before the time required, and should not have waited until the proper time came for him to go. He, as the case now appears, after he had looked up the dates for the first time, was to get the letter the very Saturday night in question. He had written her from Concord, N.H., sometime from July 21 to 24, that he would be in Boston Saturday, the 5th of August, that being his post-office address; was not expecting the letter to arrive earlier than that. So long as he subserved his sister's necessities in the matter of charity, he might also regard his business interests, provided he did not in plan and course of conduct contemplate travelling on Sunday. Had he arranged to start for Boston, and travel in Massachusetts, on Sunday, instead of Saturday, he would not have been justified.

But this is not a case of that kind. He did not arrange for, nor contemplate, travelling on Sunday over defendants' road, or any other road. Had he, in violation of law, got to Boston when he expected, he could have spent Sunday in Boston, and started for Chicago Monday morning. The Massachusetts court might, but probably would not, hold the opening and reading of his sister's letter on Sunday to have been illegal,— he would have had time to do that Saturday night. The controlling element in this case, with the State court, seems to have been that his sister's letter arrived, or would

have arrived, earlier, if his letter was written July 15, as was his erroneous impression in the trial of the State case, and which was corrected in the Circuit Court. But, for the life of me, I cannot see why the plaintiff was in fault, if he arranged to get to Boston as soon as the letter would, and that a week-day named.

Considerations connected with his sister, combined with the emergency, rendered it fit and proper for him to proceed as he did do. It is a strange doctrine, if held, that, when a passenger starts in season to reach Boston Saturday evening, and the train is delayed on the way, beyond the hour of midnight, he is bound to leave the train and stay over Sunday at the place where that hour finds him. He may be at that time within a few miles of his own home, or, in these days of rapid transit, within a short ride, in point of time. This is manifestly an issue of fact for the jury, even under the local law.

I have dealt with this last branch of the case, not knowing whether this court will hold to the Massachusetts decisions on the other point, or will adhere to what it has heretofore adjudged to be the true rule of general law.

A. A. RANNEY.

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Supreme Court of the United States.

No. 132.

THEODORE P. BUCHER,

PLAINTIFF IN ERROR,

v.

THE CHESHIRE R. R. CO. AND THE FITCHBURG R. R. CO.,

DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

SOHIER & WELCH, *for Defendants in Error.*

BOSTON:
GEO. E. CROSBY & CO., LAW PRINTERS,
383 WASHINGTON STREET.
1887.

Supreme Court of the United States.

No. 132.

THEODORE P. BUCHER, PLAINTIFF IN ERROR,

v.

THE CHESHIRE R.R. CO. & THE FITCHBURG R.R. CO.,

DEFENDANTS IN ERROR.

BRIEF OF THE DEFENDANTS IN ERROR.

What is known as the Lord's day extends in the State of Massachusetts from midnight on Saturday to the ensuing midnight — and at the time of the accident hereafter referred to, the Gen. St. of Massachusetts of 1860 were in operation, by which it was made an offence, punishable by fine, to travel on the Lord's day, except from necessity and charity.

Gen. Stat. 1860, Ch. 84, Ss. 2, 12.

From the facts, which, coming from the plaintiff in error, are no doubt stated for him as favorably as they can be, it appears that on Saturday, August 5, 1876, he being in Rutland, Vermont, started in the early morning train, expecting to reach North Bennington, Vermont, in time to take the Troy & Boston R.R. for North Adams, that he was one half-hour too late; that then being told that he could get to Boston by a freight train leaving North Adams at 7.22 Sunday morning, if he took a carriage and rode 8 miles and then took a mixed

train to North Adams; he did so; that he arrived at North Adams at 11 o'clock that evening; that at North Adams he started at about one or two o'clock Sunday morning for Boston, and on this train met with the accident for which he sues.

The reason which he gives for starting Sunday morning, August 6th, is, that he expected on Saturday, August 5th, a letter from his sister, who was ill at St. Paul, Minnesota, staying with her uncle, in answer to a letter which he had written, as he first states, on the 15th July (the month previous [p. 6], or he is rather inclined to the opinion, it was the 20th of that month that he wrote her [p. 6], or again he thinks it might have been "perhaps as late as July 22" [p. 7]. In that letter he says: "I directed her to write me at Boston by Saturday, the first Saturday of August; that I would be in Boston at that time, and would complete arrangements for bringing her home or sending for her." [p. 8].

This case, in all its substantial facts, has been decided by the Supreme Court of Massachusetts upon the testimony of the same person, the plaintiff, and that Court held that the plaintiff was not engaged in an act of charity or necessity under the statute, while travelling from North Adams, in the western part of Massachusetts, to Boston, in order to receive a letter from his sister upon his arrival in Boston, where he was to determine whether he should, to use his own language, "complete arrangements for bringing her home or sending for her."

1st. The State Courts have put a construction upon this Statute of Massachusetts in this very case, following previous decisions, and this decision has also been subsequently followed and approved.

In Bucher *v.* Fitchburg R.R. Co., 131 Mass. 156, ENDICOTT, J. in delivering the opinion of the Court says: "In order to constitute an act of charity, such as is exempted from the Lord's day act, the act which is done must be itself a charitable act. The act of ascertaining whether a charity is needful is not the charity. . . . . No previous neglect to obtain the requisite information on a previous day creates a necessity for obtaining it on the Lord's day. If it were held otherwise, a man, having an important necessary duty to perform, might wilfully neglect to perform that duty throughout the whole week, and conclude to do it on Sunday, because it was an act necessary and proper to be done. In the case at bar, it is not sufficient that it was more convenient for the plaintiff to postpone his travelling to obtain the letter from his sister in order that he might perform his private business. In McGrath *v.* Merwin, the plaintiff was repairing a wheel pit on the Lord's day, and it was said in the opinion, 'The only reason for doing the work on the Lord's day was that the defendant was doing a large business, employing many hands, and the work done on the occasion would obviate the necessity of stopping the machinery in future. The whole import of this is that it was more convenient and profitable to repair the wheel-pit on the Lord's day than it would be to do it on any secular day. This does not make it a work of necessity within the Statute.' The same duty of ascertaining whether an act of charity towards his sister was to be done had been resting on the plaiutiff for *two weeks*. It would be an extraordinary proposition that he would be justified in doing an act on Sunday which he could have done equally well on any previous secular day within that fortnight, and which he had postponed because he considered it subordinate to his secular business. Suppose he had

travelled the previous Sunday, in order the sooner to finish his business and reach Boston and obtain this letter, it could not be contended that travelling on the previous Sunday was an act of charity," etc. It is apparent that the plaintiff's duty to his sister was made subservient to his secular business.

This case followed a long line of cases in Massachusetts, which established the same doctrine.

Jones *v.* Andover, 10 Allen, 18. A man cannot travel on the evening of Sunday to supply meat to customers although his master was sick in bed Saturday and had agreed to supply them.

Stanton *v.* Metropolitan R.R. Co., 14 Allen, 485. Where the plaintiff travelled from one city to another on a Sunday to visit a stranger, a friend of his companions.

Commonwealth *v.* Sampson, 97 Mass. 457. The gathering of sea-weed on a beach on Sunday, when the next tide might carry away this sea-weed, was held not a work of necessity or charity.

Commonwealth *v.* Josselyn, 97 Mass. 411. Hoeing crops held not a work of necessity or charity, though the crops were in bad condition and suffering for want of hoeing.

McGrath *v.* Merwin, 112 Mass. 467. Cited by Judge ENDICOTT, in his opinion delivered in this case in the Supreme Court of Massachusetts.

Smith *v.* Boston & Maine R.R., 112 Mass. 490. One who travels on the Lord's day to ascertain whether a house, into which he intended to move the next day, has been cleaned, is not travelling from necessity or charity.

Davis *v.* Somerville, 128 Mass. 194. Where a person attended a funeral at Mt. Auburn and returned by way of Charlestown to call upon her sister-in-law, she was held to be

breaking the law. The Judge says: "Whatever inconveniences might result at the present day from the literal and general enforcement of the Lord's Day Act, and whatever hard cases may have arisen under it, it is still the law of the land to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of other statutes.

And it has been decided in Johnson *v.* Irasburg, 47 Vermont 28, that the necessity must actually exist. An honest belief that it is necessary is not sufficient.

Other cases have arisen since the decision in the case under examination.

Wallace v. *Merrimack River Nav. Co.*, 134 Mass. 95.
Day v. *Highland Street Railway*, 135 Mass. 113.
Read v. *Boston & Albany R.R. Co.*, 140 Mass. 199.

Two other cases may be referred to, where the Court decided that the plaintiff was not violating the statute.

In Cronan *v.* Boston, 136 Mass. 384. The Court said there was evidence for the jury that Cronan was travelling on the Lord's day *solely* for the purpose of visiting a sister, whom he believed to be ill, and who was, in fact, an invalid.

In Baker *v.* Worcester, 139 Mass. 74. The plaintiff had made a social call and was walking home, and it was held he was not a traveller. [This was thus decided by a majority of the Court.]

2d. The United States Courts are bound to follow the decision of the Supreme Court of the State upon the construction of a local statute, where those decisions have been uniform.

In Burgiss *v.* Selignan, 107 U. S. 20, 33. The opinion states that "since the ordinary administration of the law is

carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the *construction of State* Constitutions and *Statutes*. Such established rules are always regarded by the Federal Courts no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to follow their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. When contracts and transactions have been entered into, and rights have occurred thereon under a particular state of the decisions, or when there has been no decision of the State Tribunals the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts, *after* such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts, if the case seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State Courts.

Among the many authorities which support the above proposition as it regards the construction of a State Statute, we will cite a few :—

Sumner *v.* Hicks & al, 2 Black, 532, 534. Mr. Justice SWAYNE, giving his opinion, says: "In cases like this, involving the construction of a State Statute, this Court is governed by the judgment of the higher judicial authority of the State."

Leffingwell *v.* Warren, 2 Black, 599, 603, the same learned Judge says: "The construction given to a Statute of a State by the highest judicial tribunal of such State, is regarded as a part of the Statute and is as binding upon the Courts of the United States as the text.

In Rowan *v.* Runnels, 5 Howard, 134, 139, Chief-Justice TANEY in his opinion, says: "Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts, and *from the time* they are made will regard them as *conclusive* in all cases upon the construction of their own constitution and laws. But we ought not to give them a retroactive effect."

In Ohio Life Insurance & Trust Co. *v.* Debolt, 16 Howard, 416, 431, the same distinguished Judge says: "It is true that this Court always follows the decision of the State Courts in the construction of their own Constitution and laws. But where those decisions are in conflict this Court must determine between them. He subsequently refers to the case of Rowan *v.* Runnels, and quotes with approbation the language above cited from that case."

In Pease *v.* Peck, 18 Harvard, 595, 598, Mr. Justice GRIER says: "In all cases where there is a settled construction of the law of a State by its highest judicature, established by admitted precedent, it is the practice of the Courts of the United States to receive and adopt it without criticism or further, inquiry."

In Douglas *v.* Pike, 101 U. S. 677, the present Chief-Justice

says: "As a rule we treat the construction, which the highest Court of a State has given to a Statute of the State as part of the Statute, and govern ourselves accordingly — and he quotes with approbation Chief-Justice Taney's language in Rowan *v.* Runnels.

See also Meade *v.* Beale, Taney's Decisions, 339, 360.

Here we have a construction given to the Statute by the State Court in the very case under consideration, unless we err in our views upon the next point.

3d. The plaintiff presents substantially the same case which was presented to the Supreme Court of the State and upon which that Court gave its decision, and the opinion in that case would be just as applicable to the facts found in this case.

The plaintiff says, he had a letter from his "sister, who was at Minnesota, stopping with an uncle, where I sent her for her health a year previous." "She was very ill, and expressed in her letter that she preferred to be brought home to die [p. 5]. "I wrote her back that if she would prevail on her cousin to bring her as far as Chicago I would meet her there and bring her the rest of the way; or, if he preferred, to go clear through to Philadelphia, I would be very glad, because my business was such that it was disadvantageous to leave my field any longer than it was necessary," [p. 6]. This letter in answer to her's was written "about the 15th of the month [July], or it may have been later than that date. I am rather inclined to the opinion that it was the 20th of the month [July], (p. 6). Subsequently, in his evidence, he says: "The probabilities are that it was the 20th or 21st, the reasonable probabilities," [foot of p. 6]. Again, "it was likely the 20th or 22d," [p. 7].

Then he wrote his letter on July 22, [p. 7]. He directed her in this letter to write him at Boston by Saturday, August 5th, and that he "would be in Boston at that time and would complete arrangements for bringing her home, *or send* for her."

It is to be remembered that if there was any immediate or special necessity for a communication with his sister, a communication could have been had with her in a few hours time by telegraph, [see page 8].

But leaving aside the opportunity for telegraph communication, and supposing he expected the answer to his letter, whether written on the 15th or 22d, on the 5th of August, on receiving this answer he was only then to *determine* whether he would go for his sister or not. It is a very different case from what it would have been if he had received a telegram on Saturday morning while he was at Rutland, that his sister required him to come at once. The only difference between the evidence in the State Court and in the United States Court is, that in the State Court his testimony was that he wrote on the 15th July and in the United States Court he is uncertain, but thinks that the *reasonable probabilities* are that it was the 20th or 21st, or it was likely the 20th or 22d. In either case there was a fortnight in which, if there had been a necessity, he could have left for St. Paul. The Judge's opinion in the Massachusetts Court would be equally applicable to the facts as stated in the U. S. Court. Now, he received the answer to this letter on the Tuesday after the accident, brought to him from Boston, but what it contained we do not know. It may or it may not have required him to make a journey to the west. She may or may not have told him that her cousin would accompany her to Philadelphia.